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In The

Supreme Court of the United States

CYNTHIA AND DOUGLAS ANDREWS; CHAD M. ANDREWS by Cynthia and Douglas Andrews; CHRISTINE FALK; MICHAEL AND ROBIN FALK by Christine Falk; CHARLENE AND ROBERT KIRN; JENNIFER KIRN by Charlene and Robert Kirn; SHERRIE D. LaFEMINA; SHERRIE E. LaFEMINA by Sherrie D. LaFemina; JEFFREY AND KATHLEEN PRATT; JUSTIN AND JENNIFER PRATT by Jeffrey and Kathleen Pratt; NANCY POLJACIK; JASON POLJACIK by Nancy Poljacik; DIANE LUCIA; TIFFANY AND FRANK LUCIA by Diane Lucia; WILLIAM TRACY; AND TYLER TRACY by William Tracy,

Petitioners,

v.

CHITTENDEN TOWN SCHOOL DISTRICT; VERMONT DEPARTMENT OF EDUCATION; ELIZABETH SOJOURNER; FRANCES LOVE; HARRIET THORNE; REV. DONALD BENEDICT; RICHARD CLARK; HUGH SHORT; and JOHN VITA,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae* Christian Legal Society, the Union of Orthodox Jewish Congregations of America, and National Association of Evangelicals move for leave to file the accompanying brief *amici curiae*.

All petitioners and respondents who are represented by legal counsel have consented to the filing of this brief *amici curiae*. The consent letters have been filed with the Clerk of this Court. One party, Chittenden Town School District, however, has not retained legal counsel to represent it in this Court. The two persons upon whom petitioners served the petition for a writ of *certiorari* refused to consent to the filing of this brief *amici curiae*. It is not clear whether these persons have the authority to deny or grant consent on behalf of the Chittenden Town School District, but neither is it clear which person or persons do have such authority. Due to this unusual set of circumstances, it seems necessary to file this Motion for Leave to File Brief *Amici Curiae*.

Amici curiae have filed numerous briefs *amici curiae* in religious liberty cases before this Court over the past two decades. *Amici curiae* have special expertise regarding the issues raised in the petition for a writ of *certiorari*. Specifically, Christian Legal Society has filed briefs *amici curiae* in this Court, urging the unconstitutionality of viewpoint discrimination against religious ideas, persons and expression – precisely the discrimination required by the decision below – in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993). Christian Legal Society

also filed a brief *amici curiae* in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), in which this Court interpreted the Free Exercise Clause to prohibit discriminatory treatment of religious persons. Christian Legal Society filed a brief *amici curiae* this Term in *Mitchell v. Helms*, No. 98-1648, specifically on the issue of the government's ability to determine which religious institutions are pervasively sectarian and which are not – an issue highly relevant to implementation of the decision below.

Because of *amici curiae's* long involvement in issues of religious liberty, particularly protection of religious persons from discriminatory treatment and protection of religious expression from viewpoint discrimination, *amici curiae* are able to provide the Court with a unique perspective on the vital importance of the First Amendment issues raised in the petition for a writ of *certiorari*. *Amici curiae* respectfully request that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The specific interest of each *amici curiae* is set forth in the appendix. *Amici curiae* have worked to protect religious liberty for over two decades. *Amici* have particularly labored to protect religious persons from discriminatory treatment and to protect religious expression from viewpoint discrimination, both of which will result if the decision below is left to stand.[1]

ARGUMENT

"This is a case," as the petition for certiorari aptly puts it, "about discrimination – discrimination against 'religious people, religious ideas, [and] religious schools.' " Pet. at 9 (quoting *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (brackets in original) (O'Connor, J., concurring in part and concurring in the judgment)).[2] The petitioners, parents and children who reside in a public school district with no high school, are eligible under Vermont statutes to receive tuition benefits

[1] Counsel for a party did not author this brief in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *Amicus* Christian Legal Society received a grant from the Alliance Defense Fund to cover its expenses in producing this brief. The Alliance Defense Fund is a 501(c)(3) organization headquartered at 7819 East Greenway Road, Suite 8, Scottsdale, Arizona 85260. The Alliance Defense Fund exercised no control over the content of the brief.

[2] "Pet." references pages in the Petition for a Writ of Certiorari filed in this case, and "Pet. App." references pages in the Appendix to the Petition.

from the state for use at an accredited high school, public or private. However, state education administrators, and ultimately the Vermont Supreme Court, denied the families this generally available "tuitioning" benefit solely because the school the families chose, Mount St. Joseph – although conceded to be a "very good school" (Pet. App. at 5) – integrates religious instruction into its curriculum, and as such allowing the use of benefits there would violate the state constitution.[3]

Amici agree with the petition that by excluding schools from benefits solely on the basis that they include religious instruction in their classes, the state court's ruling unconstitutionally discriminates against religious exercise, in violation of the First Amendment's Free Exercise Clause, and against religious viewpoints in education, in violation of the Free Speech Clause. Moreover, it is no answer to say, as the state court did, that religious schools may receive aid if they separate religious instruction from their classes: that simply discriminates impermissibly among religions, and against those religions that take their faith seriously enough to integrate it throughout the school curriculum. In this brief, the *amici* expand on these arguments and why it is crucial for this Court to act to guard the core principle of the First Amendment as it applies to religion: no government discrimination against religious activities or viewpoints.

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[3] The state administrators overrode the judgment of the local public school district, which was willing to provide tuition benefits to students attending Mount St. Joseph; indeed, the administrators enforced the exclusion of that school so vigorously as to cut off all general state aid to the Chittenden Town School District. Pet. at 5.

A. The Decision Below Violates the Core Principle of the Free Exercise and Free Speech Clauses by Discriminating Against a Student in the Provision of Educational Benefits Because the Student Will Use Them in a Religious Setting.

1. The discrimination violates the core meaning of the Free Exercise Clause.

The scope of the Free Exercise Clause has recently divided members of this Court – specifically, on the question whether the clause ever protects religious activity from being burdened by a "neutral law of general applicability." *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (quotation omitted) (holding that free exercise usually does not include protection against such neutral laws). Cf. *id.* at 894 (O'Connor, J., concurring in the judgment) (arguing that free exercise will have little "vitality" if it "cover[s] only the extreme and hypothetical situation in which a State directly targets a religious practice").

But on the question that this case presents, the Court's pronouncements are resounding and unanimous: the law may not single out religious activity for disfavored treatment. "At a minimum," the Free Exercise Clause is violated "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Bab'alu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (citing numerous authorities). Following this rule, the Court in *Lukumi* unanimously struck down a set of ordinances that, taken together, prohibited the killing of animals only in certain religious rituals. Likewise, *Employment Division v. Smith* itself stated clearly

that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." 494 U.S. at 877. And in *McDaniel v. Paty*, 435 U.S. 618 (1978), the Court held that the Free Exercise Clause was violated by a state constitutional provision disqualifying clergy from serving in the state legislature. As Justice Brennan's separate opinion explained, the disqualification provision was unconstitutional because it "impose[d] a unique disability" on those engaging in the "protected religious activity" of the ministry. *Id.* at 632 (Brennan, J., concurring in the judgment); accord *Lukumi*, 508 U.S. at 532.

The principle that the government may not single out religious practice for disability is so well accepted that several members of the unanimous Court in *Lukumi* remarked that the case was "an easy one to decide." 508 U.S. at 580 (Blackmun, J., joined by O'Connor, J., concurring in the judgment); see also *id.* at 559 (Souter, J., concurring in part and in the judgment) ("This case turns on a principle about which there is no disagreement."). Thus, if the Free Exercise Clause means anything, it means that an individual may not be excluded from receiving a generally available government benefit solely on the ground that he or she intends to use it in a setting that involves religious activity.

The Court and individual members have often expressed the idea that laws directly targeting a religious practice for disability are rare. See, e.g., *Lukumi*, 508 U.S. at 532 (the prohibition on discrimination against religion is "not often at issue in our Free Exercise cases"); *id.* at 577-78 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (referring to the "rare occasions on

which the government explicitly targets religion (or a particular religion) for disfavored treatment"); *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment) (referring to "the extreme and hypothetical situation in which a State directly targets a religious practice").

This case, however, exemplifies the one category in which state policies targeting religion for discriminatory, "special disabilities" are *not* rare or hypothetical. The single most frequent instance of "disfavored treatment" of religion in the court decisions of this nation is the denial of generally available benefits, particularly educational benefits, to students and their families on the ground that they would use those benefits at schools that include religious activity in their instruction. The petition for certiorari catalogs the long and growing list of decisions in which courts, legislators, or administrators have excluded students at religious schools from receiving assistance available to all other students. See Pet. at 10-18 (detailing six recent decisions including this one, although also listing several decisions rejecting such exclusion). Sometimes the exclusion is based on the (erroneous) assertion that the Establishment Clause requires it; many times, as in this case, the exclusion is based on the assertion that a state constitutional provision requires it. Under either theory, the same impermissible result follows: a discriminatory withdrawal of tuition benefits on the basis of the family's choice of an education that includes religious content.

Therefore, this case presents the single most important free exercise question under the "general applicability" standard of *Employment Division v. Smith* and *Church of Lukumi Babalu Aye*. After this Court struck down

the discriminatory ordinances at issue in *Lukumi*, observers noted approvingly that the general-applicability standard could be used in some cases to give real protection to religious exercise. See, e.g., Stephen L. Carter, *Comment: The Resurrection of Religious Freedom?*, 107 Harv. L. Rev. 118, 119 (1993) (*Lukumi* shows "the possibility of fashioning a jurisprudence of the religion clauses" that protects religious exercise); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 743, 778 (1998) (*Lukumi* "appears to have given real content to the requirements of neutrality and general applicability"). But the promise of *Lukumi* will be frustrated if the Court fails to intervene in what is by far the most common instance of anti-religious discrimination, the denial of generally available benefits to students who choose to attend religious schools.

The principle that the government must not single out religion for disabilities appears not only in this Court's free exercise cases, but also in majority and separate opinions in cases decided under the Establishment Clause. That should hardly be surprising, for the two clauses ought to work together rather than at cross-purposes. The pattern goes back to one of the first modern Religion Clause decisions, *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court upheld the inclusion of students attending religious schools in a state's program of free bus transportation. Although the precise decision rested on the Establishment Clause, the Court's reasoning clearly reflected the fact that exclusion of students attending religious schools would conflict with the free exercise value:

> The First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Id. at 18. Likewise, in more recent decisions Justice O'Connor has sought to integrate the jurisprudence of the two clauses as one of "government impartiality, not hostility, toward religion" (*Kiryas Joel*, 512 U.S. at 717-18 (concurring in part and in the judgment)):

> [T]he Religion Clauses . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or *benefits*.

Id. at 715 (emphasis added). The Court has " 'time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.' " *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (quoting *Kiryas Joel*, 512 U.S. at 714 (O'Connor, J., concurring in part and in judgment)).

The decision in this case flies in the face of every one of these principles. To provide school tuition to families in districts without a public school, but withdraw it from a family as soon as the family chooses a school offering religious instruction rather than a public or secular private school, cannot communicate any stance but "hostility" toward religion. It makes the families' religion – their choice to attend a school where religious instruction is given – the very reason for denying them benefits, and thus treats them differently (unfavorably) precisely on

account of their mode of worship: that is, the fact that they choose to incorporate worship into the instruction of their children.

The bases on which the Vermont Supreme Court rejected the families' free exercise claim cannot withstand even minimal analysis; if generally applied, the court's reasoning would truly eviscerate the Free Exercise Clause. The court asserted that its ruling did not violate the Free Exercise Clause because it did not exclude all religious schools from tuitioning benefits, but only those that incorporate religious worship or instruction into their curriculum. Pet. App. at 51 (stating that the issue is not "that education occurs in a religious school, [but] rather . . . the content of that education"); *id.* at 53. The court did not explain why this avoided discrimination against religious activity and viewpoints – since no activity or instruction in another viewpoint in a private school would disqualify the school from the tuitioning benefits program. To single out one kind of religious activity still discriminates against religion.[4] The state court's reasoning is flatly inconsistent with, among other decisions, *McDaniel*. There the state did not disqualify all religious citizens from the legislature, but only clergy. Nevertheless, the provision still unconstitutionally discriminated against religion, as Justice Brennan pointed out: it "impose[d] a unique disability on those who exhibit a defined level of intensity of involvement in protected religious activity." 435 U.S. at 632 (Brennan, J., concurring in the judgment). Likewise, the exclusion from tuitioning

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[4] It also discriminates unconstitutionally among religious schools, as we discuss *infra* in part B.

benefits here imposes a unique disability on schools (and the families that choose them) with a sufficient "intensity of [religious] involvement" that they incorporate religious instruction or worship into their curriculum.[5]

Just as remarkably, the court held that the denial of tuitioning benefits "does not implicate the Free Exercise Clause" because the denial "requires no one 'to choose between following the precepts of [his or her] religion and forfeiting benefits' that would otherwise be available from the government." Pet. App. at 55, 54 (brackets in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). In other words, the court held that flat-out discrimination against a person based explicitly on religious choice is permissible as long as it does not involve a "precept" or "prohibit[ion]" of the person's religion. See *id.* (distinguishing *Sherbert* solely on the ground that Mrs. Sherbert's religious beliefs "prohibited her from working on Sundays"). The implications of this theory are breathtaking indeed. Under it, a state could charge church school buses twice the license fee for other private school buses, since no "precept" requires the church to use buses

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[5] The state court's observation that its ruling bars religious worship in public schools as well (Pet. App. at 53) is beside the point. The Establishment Clause, as well as other provisions, forbids the government to engage in religious speech or activity. But religious activity by private entities (the religious schools at issue in this case) is protected from government discrimination by the Free Speech and Free Exercise Clauses. *Rosenberger*, 515 U.S. at 841 (quoting *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion of O'Connor, J.) (emphasis in original)) (noting this "crucial difference 'between *government* speech endorsing religion . . . and *private* speech endorsing religion' ").

to transport students. Or a state could forbid a welfare recipient to use any part of her check to purchase religious materials, as long as the person's faith contained no precept requiring her to use or display such materials. Or a state could, contrary to *McDaniel v. Paty, supra*, exclude clergy from the benefit or privilege of serving in the state legislature, as long as (what is often the case) no specific precept required the person to become a clergyperson.

Such examples confirm that the reasoning below fundamentally misconstrues the Free Exercise Clause. Under this Court's unbroken practice, discrimination against religious activity is *per se* a "burden" on free exercise, regardless of whether the activity is important or mandatory to the faith or not. See, e.g., *Lukumi* (striking down discriminatory ordinances against animal sacrifice without asking whether Santeria members' precepts mandated that they sacrifice animals); *Smith*, 494 U.S. at 877 (stating that law that prohibited peyote use only for sacramental purposes would be unconstitutional, without referring to whether peyote use was required by faith or not). As Justice Blackmun put it in *Lukumi*, "a law that targets religious practice for disfavored treatment" automatically "burdens the free exercise of religion." 508 U.S. at 579 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). The discrimination itself constitutes the burden.

The Vermont Supreme Court is not the only court to distort the Free Exercise Clause this way so as to permit the state to exclude religious citizens from educational benefits. For example, the Washington Supreme Court held, under its state constitution, that a blind student

attending a religious college must be denied state rehabilitation assistance made available to all other students. *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989). There, as here, the state court justified explicit discrimination against religion on the ground that the student was "not being asked to violate any tenet of his religious belief, nor is he being denied benefits 'because of conduct mandated by religious belief.' " *Id.* at 371, 771 P.2d at 1123 (quotation omitted). By contrast, other lower courts have correctly recognized that explicit discrimination against religion is, by itself, a burden on free exercise. See, e.g., *Hartmann v. Stone*, 68 F.3d 973, 979 & nn.3-4 (6th Cir. 1995) (holding that where law is not neutral or generally applicable, challengers need not "demonstrate a substantial burden on the practice of their religion" independent of the discrimination). The decision below in this case, therefore, should be reviewed and reversed because its basic misconstruction of the Free Exercise Clause would eviscerate the clause not only in cases concerning the discriminatory withholding of benefits, but also in other instances of discrimination against religion.

2. The discrimination violates the viewpoint-neutrality requirement at the heart of the Free Speech Clause.

For similar reasons as those above, the exclusion of schools with religious instruction and worship from the tuitioning benefits programs violates the central principle of the Free Speech Clause: that the government may not discriminate between individuals or institutions according to the viewpoint they adopt or express. Most notably,

the decision below conflicts with *Rosenberger*, 515 U.S. 819, in which the Court held that the First Amendment was violated by the exclusion of a student magazine with a religious editorial viewpoint from a program under which the University paid for the printing costs of a wide range of student publications. In holding that the University had unconstitutionally discriminated against the student publication because of its viewpoint, *Rosenberger* made clear that the government's obligation of viewpoint neutrality extends fully to the provision of generally available financial benefits such as the tutitioning benefits in this case. Other free speech decisions hold that the government may not discriminate against religious viewpoints in the provision of government benefits such as access to public property and facilities. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The Vermont Supreme Court's decision in this case withholds tuitioning benefits from families that choose a school that incorporates religious worship and instruction into its curriculum. That is, the decision discriminates against schools that actually express religious tenets in their instruction. Indeed, the court acknowledged (in what it thought was a defense of its decision) that the disqualifying feature for a school was "the content of th[e] education" it provides (as opposed to mere religious affiliation). Pet. App. at 51. A school with a technical religious affiliation could, therefore, receive benefits as long as it does not express its religious beliefs in its classes or activities. A clearer case of discrimination on

the basis of expression of viewpoint could hardly be imagined.

3. No justification can be given for the discrimination against religion.

Amici doubt that there is any set of circumstances that authorizes the government to single out private religious activity and speech for disfavored treatment. See, e.g., *Lukumi*, 508 U.S. at 579 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) ("When a law discriminates against religion as such, . . . it automatically will fail strict scrutiny.")[6] Even assuming, however, that there are any "most unusual circumstances" that could authorize such discrimination (see p. 7 *supra*), the situation in this case – the exclusion of religious students from generally available "tuitioning" benefits – certainly presents no such exceptional circumstances.

The presence of a state constitutional provision that allegedly requires discrimination cannot overcome the commands of the federal Free Exercise and Free Speech Clauses. That point was decided in *Widmar*, 454 U.S. 263, where this Court held that a state university violated the Free Speech Clause by refusing a student religious group permission to meet in university classrooms that were open to all other student groups. There, as here, the

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[6] Again, the Establishment Clause forbids the government itself from speaking or acting religiously; public school districts in Vermont may not sponsor official religious exercises. But that principle has no application to the question in this case, which involves discrimination against religious activity in private schools that are in no sense the mouthpiece of the state.

university asserted a state constitutional interest "in achieving a greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution." *Widmar*, 454 U.S. at 276; see also Pet. App. at 53 (concluding that while there may be "no First Amendment objection" to parents choosing to use public money at religious schools, the Vermont Constitution forbids it). The *Widmar* Court held squarely that given the limits imposed by the Free Speech and Free Exercise Clauses, an asserted interest in "strict separation" is not "sufficiently 'compelling' to justify content-based discrimination against [citizens'] religious speech." 454 U.S. at 276. See also *McDaniel*, 435 U.S. 618 (striking down state constitutional provision disqualifying clergy from legislature).

The only provision that could possibly authorize discrimination forbidden by the Free Exercise and Free Speech Clauses is the First Amendment's Establishment Clause. But the Vermont Supreme Court did not rely on the Establishment Clause (indeed, the court had earlier held in virtually identical circumstances that including religious schools in the tuitioning program was consistent with the Establishment Clause). See *Campbell v. Manchester Bd. of School Directors*, 161 Vt. 441, 644 A.2d 352 (1994). More important, the equal inclusion of religious schools clearly is consistent with the Establishment Clause under this Court's precedents. Numerous decisions hold that the clause permits the equal inclusion of religious individuals or groups in a neutral program of government benefits. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); *Rosenberger*, 515 U.S. at 838-46; *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v.*

Washington Dept. of Services, 474 U.S. 481 (1986) (*Witters I*); *Mueller v. Allen*, 463 U.S. 388 (1983). The tuitioning program shares the same crucial feature with the programs in all of those cases: it simply permits benefits to be used in a religious setting on the same terms as in other settings, and thus under the program the government creates no incentive to choose religious education over any other form of education.

At the very least, neutrality and non-discrimination against religion is the command of the First Amendment in the vast majority of cases, and only in "the most unusual circumstances" would the Establishment Clause ever call for such discrimination. This case plainly falls into the general rule under which the Establishment Clause permits, and the Free Exercise and Free Speech Clauses require, equal treatment for religious activity and speech in the provision of government benefits. Several factors make this clear. As was the case with the rehabilitation grants to students upheld in *Witters I*, the tax deductions for families upheld in *Mueller*, and the sign-language interpreter upheld in *Zobrest*, tuitioning benefits here "ultimately flow[ ] to religious institutions only as a result of the genuinely independent and private choices of aid recipients." *Witters I*, 474 U.S. at 487; see *id.* at 493 (O'Connor, J., concurring) (because "[t]he aid to religion . . . is the result of petitioner's private choice," "[n]o reasonable observer [would think] that the state itself is endorsing a religious practice or belief"). Moreover, the tuitioning program provides the same benefits for use at public institutions – in this case, at other public school districts – as at private institutions, and religious schools by no means "threaten[ ] to dominate the forum." See

Rosenberger, 515 U.S. at 850-51 (O'Connor, J., concurring); see also *Widmar*, 454 U.S. at 263.[7]

B. The Decision Below Violates the Core of the Religion Clauses by Discriminating Among Religious Schools According to Their Degree of Religiosity.

The decision below not only discriminates against private religious speech and activity, it sets a religion-based criteria discriminating *among* religious schools. As noted above, the state court (in what it thought was a defense of its ruling) explained that the ruling did not bar the use of tuitioning benefits at all religious schools, but only at those religious schools in which religious instruction and worship are included in the curriculum. See, e.g., Pet. App. at 51 (objecting that tuitioning will, in part, "directly pay for religious instruction"); *id.* ("the issue [is not] that education occurs in a religious school, [but] rather . . . the content of that education"). In short, as the petition puts it, the decision below excludes "those schools that incorporate too much 'religious instruction' into their curriculum," and thus "create[s] discrimination *among* religious schools, based on 'how religious' they are." Pet. at 27 (emphasis in original).

Amici agree with the petition that the decision below therefore creates a "denominational preference" in violation of the fundamentals of *both* Religion Clauses. "The

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[7] See Pet. at 4-5 nn.2, 4 (noting that a large number of "tuitioned" Vermont students use the benefits at public high schools, and many private high schools in the state are non-religious).

clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Based on the same principle, the Court in *Kiryas Joel* struck down a law creating a public school district to accommodate members of one religious sect. See *Kiryas Joel*, 512 U.S. at 702-04; *id.* at 715-16 (O'Connor, J., concurring in part and in the judgment) (Religion Clauses cannot "justify discriminations based on sect"). Accord *Lukumi*, 508 U.S. at 535-36, 538-39 (striking down animal-sacrifice ordinances in part because they targeted one religious sect, the Santeria, over others). Surely it is impermissible for the government to condition the availability of educational benefits to families on a religious school's being willing to secularize to the point where religious worship and instruction are nonexistent or minimal parts of the curriculum. The Constitution emphatically forbids any preference for "low intensity" religion over "high intensity" religion. See *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment) (government may not classify based on "intensity of involvement" in religious activity).[8]

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[8] This Court has granted certiorari in *Mitchell v. Helms*, No. 98-1648, *cert. granted*, 119 S.Ct. 2336 (June 14, 1999), on the question whether the Establishment Clause permits certain forms of government aid given directly to religious schools. Because *Mitchell* involves establishment rather than free exercise and speech questions, and because it involves direct aid rather than (as in this case) benefits determined by individual choice, *amici* agree that this case poses different (although equally important) questions. However, at the very least, the petition here should be held pending the decision in *Mitchell*.

CONCLUSION

Amici submit that the conflicts between the decision below and core First Amendment principles are too severe and pervasive to pass without correction. Moreover, the discrimination against religion reflected in this case is not isolated: other courts have likewise ratified the discriminatory denial of education benefits (though still other courts have recognized such discrimination as unconstitutional), and the same issue is likely to recur in other states.

The Court's discussion of the Establishment Clause question may be affected by, and in turn speak to, the fundamental free exercise principle of nondiscrimination against religion. Moreover, the briefs in *Mitchell* discuss extensively the category of "pervasively sectarian schools" that allegedly are disqualified from receiving substantial direct government aid. See, e.g., Brief for Petitioners Guy Mitchell *et al.* at 33-46 (criticizing the category); Brief *Amici Curiae* of Christian Legal Society *et al.* (same); Brief for Respondents Mary Helms *et al.* at 33-35 (defending the category). Any discussion by this Court of the "pervasively sectarian" category is likely to be highly relevant to the Vermont Supreme Court's distinction between schools that incorporate religious worship and instruction in their curriculum and those that do not.

Amici respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center labors to preserve religious liberty in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides accurate information to the public and political branches concerning the interaction of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of many individuals, Christian and non-Christian, and on behalf of many religious organizations in virtually every case before the Supreme Court involving church/state relations. These include *Widmar v. Vincent,* 454 U.S. (1981); *Witters v. Washington Dept. of Servs. for the Blind,* 474 U.S. 481 (1986); *Bowen v. Kendrick,* 487 U.S. 589 1988); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993); *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995); and *Agostini v. Felton,* 521 U.S. 203 (1997).

This nation's Declaration of Independence "instituted a new government" by announcing that it was "laying its foundations on [immutable] principles." One of these

"self-evident truths" was that all persons are divinely endowed with rights that no government may abridge nor any citizen divest. Among such inalienable rights are those enumerated in – but not conferred by – the First Amendment, the foremost of which is religious freedom. The right to freely exercise religious conscience inheres in all persons by virtue of its endowment by the Creator. It is also a "constitutional right," but in the sense that it is recognized in rather than created by the United States Constitution. Because the source of religious liberty, as acknowledged in the Declaration, is the Creator, not a constitutional amendment, statute, or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of federal, state, or local government. This nation has no higher duty than to protect inviolate its full and free enjoyment. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The Christian Legal Society's national membership, 25 years of experience, and professional resources enable it to speak with authority upon religious liberty matters before this Court.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The Union of Orthodox Jewish Congregations of America (the "**U.O.J.C.A.**") is a non-profit synagogue umbrella organization for over 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the mainstream Orthodox Jewish community. The U.O.J.C.A. has filed briefs in federal and state courts throughout the nation in cases that affect the interests of the Jewish community and American society at large.

The U.O.J.C.A. has been particularly active and interested in cases that center upon the role of religion in our society and the interpretation and application of the Establishment and Free Exercise Clauses in that regard. It has been the consistent position of the U.O.J.C.A. that the Establishment Clause does not require government to disfavor religion in any way.